NO. 87-1518

SUPREME COURT OF THE UNITED STATES

October Term 1987

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**STATE OF FLORIDA,**

Petitioner,

v.

**FLOYD MORGAN,**

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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# PETITIONER'S REPLY BRIEF

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## QUESTION PRESENTED

Whether the Florida Supreme Court's **sua sponte** drafting and granting of a collateral attack, without providing notice or argument to the State, violated due process.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**OTHER AUTHORITIES**

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

---

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**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

The Petitioner, State of Florida, submits for the Court's consideration this reply to certain arguments and statements of facts raised in the Respondent's Brief in Opposition.

## OPINIONS BELOW

The Petitioner's original statement is relied upon.

## JURISDICTION

The Betitioner's original tatement is relied upon.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner's original statement is relied upon.

## STATEMENT OF THE CASE

The Petitioner is compelled to correct misstatements of fact contained in Mr. Morgan's response so that this Court will not be misled.

**First,** Morgan did not raise a claim of error under **Lockett v. Ohio,** 438 U.S. 586 (1978) or **Hitchcock v. Dugger,** U.S. _____, 107 S.Ct. 1821 (1987). The touted footnote at page 49 of a 50 page

brief (on the singular issue of ineffective assistance of counsel), does not raise **Lockett** at all. Rather, it states that counsel's failure to present evidence to the trial judge deprived him of **"Lockett"** evidence. That is not the same thing as raising **"Lockett"** error **per se.**

**Second,** the tape recorded oral argument contains a request by Morgan's counsel for leave to "amend orally" the "3.850" petition, on appeal, to **add** a **"Hitchcock"** claim as a new, alternate, theory or claim for relief. Thus, the same lawyer who now claims he briefed **Lockett** and **Hitchcock** did not maintain that position before the Florida Supreme Court.

**Third,** when this attorney began to present the State's case he was immediately interrupted with questions regarding **Hitchcock** posed by the same two justices (Kogan and Overton) who raised the issue

during Morgan's argument. Counsel was required to answer the questions. That ambush, however, was not tantamount to notice and the right to prepare and present a cogent argument. Counsel for the State, the tape shows, directed the **"Hitchcock-Lockett"** questions into an argument of "no prejudice" under the prejudice prong of **Strickland v. Washington**, 466 U.S. 688 (1984). Counsel argued that defense (trial) counsel was aware of **Gregg v. Georgia**, if not **Lockett**, and that valid strategic grounds existed for not presenting the so-called "non-statutory mitigating evidence". That argument was not **"Hitchcock"** argument.

Justices Kogan and Overton raised **"Hitchcock"** for the first time at oral argument on behalf of Mr. Morgan. Morgan did not raise it and the State was denied a fair opportunity to argue the issue.

## REASONS FOR GRANTING THE WRIT

Mr. Morgan's response contends that the Petitioner is not entitled to certiorari because the State, in fact, argued **"Hitchcock"** and because the State is not entitled to due process of law. He is wrong on both counts.

As reported above, the **"Hitchcock"** issue was never raised in the trial court, nor was it briefed on appeal. Morgan's footnote does not address the jury instruction issue which stands at the base of **Hitchcock** nor does it allege **"Lockett** error" (which is distinct from **"Hitchcock** error") by the Court. What the footnote says is that trial counsel's failure to produce **"Lockett"** evidence deprived the court of evidence it would have ordinarily considered.

Morgan cites no authority, and cannot do so, for the proposition that the mention

of **Lockett** in the course of arguing "ineffective assistance of counsel" somehow preserves all variations of **"Lockett"** and **"Hitchcock"** error for review. Even if Morgan had intended to argue **"Lockett"** or **"Hitchcock"** in a footnote to a claim of ineffective assistance of counsel, he could not do so. In Florida, legal issues that are to be relied upon as a basis for relief must be separately identified and briefed. They cannot be sneaked into a brief, in a footnote, under a different heading. This tactic has been sanctioned as unprofessional practice and claims raised in this manner have been disallowed. **Singer v. Borbua,** 497 So.2d 279 (Fla. 3rd DCA 1986); **Lynch v. Tennyson,** 443 So.2d 1017 (Fla. 5th DCA 1983); **McClendon v. International House of Pancakes,** 381 So.2d 728 (Fla. 1st DCA 1980); Fla.R.App.P. 9.210(b)(5), see also

**Florida Citrus Commission v. Owens,** 239 So.2d 840 (Fla. 4th DCA 1970); **Anderson v. State,** 215 So.2d 618 (Fla. 4th DCA 1968).

The State submits that learned counsel for Mr. Morgan did **not** behave unprofessionally because counsel did **not** raise a **Hitchcock** claim. Morgan's present argument is simply an opportunistic attempt to fluff up "facts" to support an untenable position - and he knows it.

Morgan's claim that the people are not entitled to due process of law essentially proves the need to grant certiorari in this case. In **Snyder v. Massachusetts,** 291 U.S. 97 (1933), this Court held that a state is specifically, "also", entitled to "justice". Yet, in actions capable of repetition, yet evading review, see **Gerstein v. Pugh,** 420 U.S. 103 (1975), lower federal courts and some state courts are saying that "justice" is a one

way street, and that the people do not have the same due process rights collectively that they enjoy individually. Thus, while this Court says "the people" have rights, lower courts say they do not.

Mr. Morgan attempts to relate the case at bar to those portions of the Fourteenth Amendment relating to "life, liberty or property" (disregarding "equal protection of the law", curiously), ridiculing the State for suggesting it has rights. This argument can and will be answered if certiorari is granted.

Mr. Morgan attempts to compare disputes between political subdivisions of a state and the state itself, to this case, but cannot do so. Florida itself and Floyd Morgan are the litigants.

Finally, Morgan suggests that the problem between the people of Florida and the Florida Supreme Court is one to be

resolved by the state - but does not say "how". Civil liberties simply cannot be suspended by a state, or a court, until enough people are injured to finally force some political or electoral action. Even political responses by the State will not resolve the due process issue.[1]

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[1] We note that since this petition was filed, Florida was denied due process in the **ex parte** handling of a federal habeas corpus petition in **Dugger v. Johnson**, U.S. _____, (March 15, 1988), Case No. A-698.

## CONCLUSION

Mr. Morgan has conceded the existence of a constitutional issue which he cannot avoid by distorting or restating the facts. The issue is due process and the violation is at hand. Certiorari review is necessary.

Respectfully submitted,

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